82-1162

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE BANTA COMPANY, INC., BANTA DIVISION,
*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether court enforcement of an NLRB order which predicates liability upon an allegation and legal theory that is not within the scope of the unfair labor practice complaint as litigated and prosecuted by the NLRB General Counsel and is specifically disavowed by the NLRB General Counsel (a) usurps the General Counsel's statutory independence under Section 3(d) of the NLRA, and (b) violates a respondent's due process rights in an unfair labor practice hearing?

Whether the National Labor Relations Act requires an employer to displace economic strikers who return to work during the course of an economic strike if other more senior economic strikers subsequently apply for reinstatement at the end of the strike and there is an insufficient number of jobs available?

Whether collectively negotiated contractual provisions which specifically set forth the method by which striking employees will be reinstated to available jobs after a strike constitute a valid contractual waiver of strikers' statutory reinstatement rights?

## PARTIES TO THE PROCEEDING

Pursuant to Rule 21.1(b), in addition to the names of the parties in the caption on this petition, Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO, was an intervenor in the court below.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, GEORGE BANTA COMPANY, INC., BANTA DIVISION,[1] petitions for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia entered in this case on August 13, 1982.

## CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia is reported at 686 F.2d 10 (D.C. Cir. 1982), and is reproduced herein as Appendix A. The opinion of the National Labor Relations Board is reported at 256 N.L.R.B. 1197 (1981) and is reproduced herein as Appendix B.

[1] Pursuant to Rule 28.1 of the Rules of the Court, Petitioner states that it has no parent company, subsidiaries (except wholly-owned subsidiaries) or affiliates.

## JURISDICTION

The Company sought review of the NLRB's decision in the Court of Appeals pursuant to the provisions of 29 U.S.C. § 160(e). The opinion and judgment of the Court of Appeals was entered on August 13, 1982. On September 13, 1982, the Company filed a timely Petition for Rehearing and suggestion for rehearing *en banc* which was denied on October 12, 1982 (Appendix C). This Petition for Certiorari was filed within 90 days of the denial of the Petition for Rehearing in accordance with the requirements of 28 U.S.C. § 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 3(d), 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 153(d), 158(a)(1), (3), and (5), and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. They are reproduced herein as Appendix D.

## STATEMENT OF THE CASE

Petitioner, Banta Division of George Banta Company, Inc. ("Company") is engaged in the printing business and operates two production facilities in Menasha, Wisconsin. In 1977, at the time of the protracted labor dispute which gave rise to the alleged unfair labor practices in the instant case, the Company employed approximately 750 employees who were represented for collective bargaining purposes by two locals of the Graphic Arts International Union ("Union").[2] With the 1974 collective bargaining agreement set to expire on April 3, 1977, the Company in December 1976 advised the union of its desire to commence negotiations, stating "the Agreement must be significantly modified if we are . . . to be competitive" (R. Ex. 13, 44; Tr. 803, 1752, 53). Although numerous sessions were held prior to the expiration date of said agreements, including sessions involving a federal mediator, no agreement was reached and the Union voted to go on strike on April 4, 1977, the same day that the Company implemented its final offer.

As the strike dragged on through what would have been the Company's busiest season and as business conditions worsened, it became increasingly apparent that if and when the strike ended, operations could be resumed only on a greatly reduced basis. Moreover, anticipating that there might be more returning strikers than available positions, the Company sought to assure that the reinstated strikers would constitute a stable work force. Accordingly, the Company formulated a proposed preferential reinstatement system (PRS) prior to any striker returning to work (Tr. 1967; C.G. Ex. 10). After the Company had drafted the proposed PRS but before its presentation to the Union, a number of strikers made unconditional offers of reinstatement (Tr. 1106, 1967-68). By October 4, when the

[2] The two locals were 32B and 88L which merged to form Local 382, which continues to represent these employees in the same separate appropriate bargaining units (Appendix B, 5).

Company presented the proposed PRS to the Union, approximately 70 strikers had been reinstated to their former positions in chronological order of their offers of reinstatement (G.C. Ex. 51; Tr. 135, 1969-70, 2065, 2076, 2336). Following the Union's initial objections to the proposed PRS, the Company submitted a final offer, including a modified PRS for each bargaining unit. In an exchange of letters between the parties, the Union on October 10 stated:

> [W]e now reaffirm our acceptance of your total offer, including your Preferential Reinstatement System, to the full extent that the Preferential Reinstatement System does not violate the legal reinstatement rights of the striking employees. In our view, the law preserves the right to present to the NLRB any issue as to the legal reinstatement rights of striking employees.

By return messenger, the Company sent the following response:

> It is our understanding that while you have accepted our total offer, you have reserved the right to challenge the legality of all or portions of the Preferential Reinstatement System. This is, of course, your right and we do not construe your acceptance of our total offer as a waiver of any rights under the NLRA except to the extent such rights are waivable and have been waived by the language of the agreement.

By virtue of the Union's acceptance of the Company's total offer, including the PRS which was an integral part thereof,[3] the strike ended and production resumed to the extent permitted by business conditions.

After the strike ended, the Company utilized the negotiated PRS to determine which returning strikers would be reinstated to available positions. In accordance with the negotiated terms of the PRS, strikers who had been reinstated

[3] Virtually identical reinstatement systems were negotiated with the Union for each of the two bargaining units. The negotiated PRS for Local 88L is attached as Appendix E.

prior to the end of the strike were not bumped or removed from their positions even though more senior strikers made unconditional offers to return to work following the end of the strike. Those strikers who could not be reinstated immediately to their pre-strike positions were placed in any other job classification for which a vacancy existed, provided the employee was qualified for the position, or placed on a preferential hiring list for future vacancies to the same or substantially equivalent positions in chronological order of their unconditional offers of reinstatement (Appendix E; G.C. Exs. 21, 22). The negotiated PRS provided that "an employee reinstated pursuant to this Preferential Reinstatement System shall be paid the rate of the classification to which he is reinstated" (G.C. Ex. 21, 22).

Subsequently, on October 20, 1977, the Union filed unfair labor practice charges alleging that the Company's reinstatement of returning strikers in accordance with the terms of the negotiated PRS violated Sections 8(a)(1) and (3) of the NLRA. In the consolidated complaint that was subsequently issued, it was alleged that the Company violated Sections 8(a)(1) and (5) of the NLRA by unilaterally implementing its final contract offer on April 4, 1977 at a time when a bargaining impasse had not occurred and that the resulting strike was an unfair labor practice strike. Premised on this allegation, the consolidated complaint then alleged that the Company violated Sections 8(a)(1) and (3) of the NLRA by granting preferential reinstatement or preferential seniority rights to jobs and rates of pay only to those employees who abandoned the strike and who offered or who did return to work before the Union actually abandoned the strike (C.P. Ex. 2).

At the hearing, the NLRB General Counsel explicitly articulated the scope of the complaint which he was litigating and prosecuting. First, NLRB General Counsel alleged that the Company violated its duty to bargain by unilaterally implementing its final contract offer on April 4, 1977. Second, the NLRB

General Counsel alleged that since the striking employees enjoyed the status of unfair labor practice strikers due to the unilateral implementation of the final contract offer, the Company violated Section 8(a)(3) when, consistent with the PRS negotiated with the Union, it declined to displace strikers already reinstated in order to make room for more senior strikers who sought reinstatement at a later date (Tr. 698, 1213-14). The General Counsel did not allege a violation of the reinstatement rights of the strikers if the strike was found to have been economic in nature and, indeed, repeatedly reaffirmed that if the strike was an economic strike, the Company acted lawfully in its reinstatement of strikers (Tr. 702, 706, 714, 721, 1520, 1870). *See* Appendix F.

On October 15, 1979, the Administrative Law Judge issued his decision and recommended order in which he found that there was a bona fide impasse in negotiations on April 4, 1977, when the Company implemented its final offer and that "General Counsel has therefore failed to establish here that the Employer violated Sections 8(a)(5) and (1) of the Act as alleged and, consequently, that the ensuing six months strike was an unfair labor practice strike" (Appendix B, 52). Having so held, the ALJ nevertheless went on to find, contrary to the complaint as articulated and litigated by the NLRB General Counsel, that the Company's reinstatement of strikers in accordance with the terms of the negotiated PRS violated Sections 8(a)(1) and (3) of the NLRA. On July 16, 1981, a three-member panel of the NLRB affirmed certain rulings of the ALJ and adopted his recommended order in its entirety. The Board, however, specificially limited its affirmance of the ALJ's rulings, findings and conclusions through footnote 4 to its decision in which the Board held that the strikers' reinstatement rights were governed by the settlement stipulation.[4]

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[4] With respect to a prior unfair labor practice charge, the Company had entered into a settlement stipulation before any striker returned to work which provided that strikers would be reinstated to such positions *as were available* if the strikers made an unconditional offer to return to work within 60 days of the posting of the settlement notice. *See* C. P. Ex. 3.

On August 13, 1982, the Court of Appeals for the District of Columbia in an opinion written by Circuit Judge Abner Mikva denied the Company's petition to deny enforcement of the Board's order and granted the Board's cross-petition for enforcement. Although the D. C. Circuit noted that "the blame for much of the confusion in this case must be laid on the NLRB" and that "the Board's opinion in this case is hardly a model of clarity" (Appendix A, 27), the court nevertheless held that the "PRS was unlawful because it gave preferential reinstatement and seniority rights to one class of employees simply because those employees had abandoned the strike before the strike ended" (Appendix A, 27-28). The court, after acknowledging it had "some sympathy for Banta's frustration at the misleading comments of NLRB Counsel," nevertheless held that the General Counsel's "comments in their entirety hardly demonstrate a coherent theory of the case on which Banta could have relied comfortably" (Appendix A, 24). Finally, the court held that since "the parties had agreed to disagree about the legality of the PRS," there was no "clear and unmistakable waiver of statutory rights" (Appendix A, 19).

On September 13, 1982, the Company filed a petition for rehearing which was denied on October 12, 1982 (Appendix C). Petitioner now seeks review of the D. C. Circuit's decision in this Court.

## REASONS FOR GRANTING THE WRIT

### I. The D.C. Circuit's Decision That Unfair Practice Liability Can Be Predicated Upon An Allegation And Legal Theory That Is Not Within The Scope Of The Complaint As Articulated And Prosecuted By The NLRB General Counsel And Is Specifically Disavowed By The NLRB General Counsel Raises Important Questions Concerning The Statutory Independence Of The NLRB General Counsel And The Due Process Rights Of Respondents In NLRB Unfair Labor Practice Proceedings.

The clear holding of the decision of the court below is that unfair labor practice liability can be imposed on the basis of an allegation not within the scope of the complaint as prosecuted and litigated by the NLRB General Counsel[5] and, indeed, specifically disavowed by the NLRB General Counsel. Thus, the NLRB General Counsel's consistent and unequivocal position, stated repeatedly throughout the course of the hearing, was that the Company's implementation of the negotiated PRS violated the NLRA if, and only if, the April 4, 1977 strike was an unfair labor practice strike due to the absence of a bargaining impasse.[6] The NLRB General Counsel never alleged, never prosecuted, and specifically disavowed the charging party's contention that the Company's recall of strikers in accordance with the terms of the negotiated PRS was illegal if the strike was determined to be an economic strike. Consistent with the scope of the complaint as prosecuted by the NLRB General

[5] The terms "NLRB General Counsel" and "General Counsel" as used herein include the attorney who represented the NLRB General Counsel in the hearing in the instant case.

[6] Not surprisingly, approximately two-thirds of the lengthy hearing before the ALJ concerned whether the parties were at impasse on April 4, 1977 and whether the resulting strike was an economic or an unfair labor practice strike. Another portion of the hearing concerned the legality of the Company's discharge of six employees for alleged strike misconduct, a matter no longer at issue.

Counsel, whenever the Union attempted to advance the theory that the PRS as implemented violated the NLRA even absent impasse, he expressly disclaimed such a theory (Tr. 702, 706, 714, 1213-16, 1520, 1870, 2665). Further, as the ALJ acknowledged, the Company steadfastly objected to all attempts by the Union to expand the complaint independent of approval by the General Counsel (Tr. 1219). Significantly, when the NLRB General Counsel amended the complaint, he did so specifically and explicitly, and did not amend the complaint in such a manner as to alter his theory of liability repeatedly professed throughout the hearing. Quite simply, the NLRB General Counsel specifically disavowed any allegation that the PRS was illegal if the strike was an economic strike, repeatedly argued against such an allegation, refrained from amending the complaint to include such an allegation, and refrained from briefing such an allegation in his post-hearing brief.[7]

Contrary to the D.C. Circuit's holding, the numerous clear and explicit statements by the NLRB General Counsel concerning the scope of the complaint, which are excerpted in Appendix F, set forth a "coherent theory of the case" on which the Company reasonably relied in preparing and presenting its defense. The following is typical (Appendix F, 5-6):

> If this were an economic strike . . . we would not be alleging the Preferential Reinstatement System violated Section 8(a)(3). *** We are not attacking the validity of the Preferential Reinstatement System if it's found to have been an economic strike.

The following two exchanges between the NLRB General Counsel and the ALJ make absolutely clear the basis upon

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[7] In fact, the General Counsel's brief expressly acknowledged that a finding that the Company violated 8(a)(1) and (3) by its reinstatement of strikers was necessarily predicated on a finding that the Company violated 8(a)(5) through its unilateral implementation of its final contract offer. A finding that the strike was an unfair labor practice strike because a bargaining impasse did not exist on April 4, 1977, thus, was prerequisite to finding the PRS illegal under the complaint as litigated by the General Counsel. *See* brief of General Counsel at 2 n. 3.

which the NLRB General Counsel was seeking to impose unfair labor practice liability upon the Company (Appendix F, 5):

> [ALJ Itkin:] I only want the record to be very clear at this point, if there was any ambiguity, the General Counsel in effect acknowledges now as he has acknowledged earlier according to my notes that if this strike were found to be an economic strike and not an unfair labor practice strike, the PRS agreement as implemented would not be violative of Section 8(a)(3) of the Act.
>
> [Mr. Loomis:] That's correct.
>
> * * *
>
> [ALJ Itkin:] It is your position as representative of the General Counsel that the PRS system would neither be discriminatory *nor inherently discriminatory* as the case may be if this were an economic strike?
>
> [Mr. Loomis:] *Yes, Your Honor, That's Correct.* (Emphasis added.)

Despite these clear and unambiguous statements as to the scope of the complaint being litigated by the NLRB General Counsel, both the NLRB and the court below imposed unfair labor practice liability upon the Company, even though the ALJ specifically ruled that the strike was an economic strike. This case, then, raises in the most direct manner possible important questions concerning the statutory independence of the NLRB General Counsel and the related due process rights of respondents in unfair labor practice proceedings.[8]

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[8] The existence of the settlement stipulation does not in any way affect the legal analysis of the legal issues discussed in this section of the petition. The complaint never alleged, and the General Counsel never contended, either directly or indirectly, that the Company had violated any term of the settlement stipulation. In response to questions from the ALJ, the General Counsel stated that "General Counsel does not wish this to be viewed as a compliance proceeding, or quasi-compliance proceeding" (Appendix F, 2). While the ALJ, as

*(Footnote continued on following page)*

Under the NLRA, as amended by the Taft-Hartley Act in 1947, the NLRB General Counsel has the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, *and in respect to the prosecution of such complaints before the Board...*" 29 U.S.C. § 153(d) (1976) (emphasis added). The NLRB General Counsel's exclusive authority in the prosecution of complaints and the presentation of legal theories upon which unfair labor practice liability is sought has been repeatedly emphasized and accepted by other federal appellate courts. *See, e.g., Royal Typewriter Co. v. NLRB,* 533 F.2d 1030, 1040 (8th Cir. 1976) ("It is the general rule that discretion to frame the issues in an unfair labor practice case rests in the General Counsel, who occupies a role not unlike that of a prosecutor"); *Local 282, IBT v. NLRB,* 339 F.2d 795, 799 (2d Cir. 1964) ("... since 1947 the General Counsel ... is *dominus litis;* the General Counsel has power to decide whether to issue a complaint ..., and to determine what its legal theory should be"); *McLeod v. Local 239, Teamsters,* 330 F.2d 108, 111 (2d Cir. 1964) (Section 3(d) "made it quite clear that the General Counsel was to have final authority at all times with respect to prosecuting unfair labor practices on behalf of the Board"); *Wellington Mill Division, Westpoint Mfg. Co. v. NLRB,* 330 F.2d 579 (4th Cir. 1964) ("The decision as to the scope of the complaint is for the General Counsel"). *See* H.R. Rep. No. 510, 80th Congress, 1st Sess., *reprinted in* 1947 U.S. Code Cong. & Ad. News 1135, 1143 ("The General Counsel is to

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*(Footnote continued from preceding page)*

the D.C. Circuit noted, did make reference in his interim ruling to the settlement stipulation, neither the Company nor the General Counsel proffered any evidence relating to the Company's compliance with the terms of the settlement stipulation. It is well-established that neither the Board nor any of its ALJs can inject issues in unfair labor practice proceedings that are not within the scope of the unfair labor practice complaint being prosecuted by the General Counsel. *See, e.g., NLRB v. Tamper, Inc.,* 522 F.2d 781, 789-90 (4th Cir. 1975).

have ... final authority to act ... independently of any direction, control, or review by the Board ... in respect to the issuance of complaints of unfair labor practices, and in respect of the prosectuion of such complaints before the Board").

The court below, however, held that decisions such as those just cited were "beside the point" because of what the D.C. Circuit considered to be "the adjudicatory responsibilities of the Board" (Appendix E, 25 n.17). While the Board unquestionably retains the adjudicatory responsibility for establishing policy under the NLRA, the Board is, nevertheless, bound by the General Counsel's determination of the scope of the complaint. While the Board may, in carrying out its statutory responsibilities, reject a theory of liability prosecuted by the General Counsel, it may not establish liability based on an allegation that goes beyond the scope of the complaint as prosecuted and litigated by the General Counsel. This is made clear by numerous appellate decisions holding that the Board may not entertain amendments to unfair labor practice complaints which the General Counsel opposes. *See, e.g., United Steelworkers of America v. NLRB,* 393 F.2d 661, 664 (D.C. Cir. 1968).

Moreover, the D.C. Circuit's decision that unfair labor practice liability can be predicated upon an allegation and legal theory specifically disavowed by the NLRB General Counsel directly affects the due process rights of respondents in unfair labor practice hearings. The well-established right of respondents to due process in such hearings would be rendered meaningless if the Board were able, as the D.C. Circuit holds, to adopt bases of liability not premised on allegations prosecuted and litigated by the General Counsel. As the Eighth Circuit observed in *Montgomery Ward Co. v. NLRB,* 385 F.2d 760, 763 (8th Cir. 1967), "evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice. It offends elemental concepts of due process to grant enforcement to a finding neither charged in the complaint nor

litigated at the hearing." Significantly, the D.C. Circuit did not cite to any case holding that full and fair litigation—consonant with a respondent's due process rights—can occur where the NLRB General Counsel specifically and repeatedly disavows and refuses to prosecute at the hearing the allegation upon which the NLRB and the court below ultimately based liability. *There are none.*

The Supreme Court should grant this writ in order to resolve the conflict between the D.C. Circuit in the instant case and other federal appellate courts concerning the statutory duties of the NLRB General Counsel under Section 3(d) of the NLRA in prosecuting unfair labor practice complaints and the related due process rights of respondents in unfair labor practice proceedings.

**II. By Requiring An Employer To Displace Economic Strikers Who Returned To Work During The Course Of An Economic Strike With More Senior Strikers Who Subsequently Applied For Reinstatement At The End Of The Strike, The Decision Of The D.C. Circuit Runs Counter To The National Labor Policy Which Grants Employees The Right To Refrain From Strike Activity And Directly Conflicts With A Very Recent Decision Of The Seventh Circuit**

Despite signing the negotiated Preferential Reinstatement System (PRS) which was an integral part of the collective bargaining agreement (Appendix E), the Union subsequently challenged the legality of the PRS because, under the PRS, employees who applied for reinstatement and were reinstated to work prior to the end of the strike were not subject to displacement by more senior strikers who applied for reinstatement following the end of the strike. In upholding the Board's determination that the Company's reinstatement of strikers pursuant to the negotiated PRS was illegal, the D.C. Circuit's decision requires employers now to displace economic strikers

who return to work during the course of a strike with more senior strikers who subsequently apply for reinstatement at the end of a strike where there are insufficient jobs available at the end of the strike to permit reinstatement of the entire complement of pre-strike employees. The D.C. Circuit's decision mandates such displacement, even if the employer and the union expressly negotiate an alternative method of reinstatement, a result directly counter to national labor policy.

The right to strike is, of course, protected by Section 7 of the NLRA, 29 U.S.C. § 157. Moreover, the Act prohibits an employer from discriminating against an employee for engaging in concerted activity, which includes the protected right to strike. 29 U.S.C. § 158(a)(1) and (3). The NLRA, however, also protects an employee's right to refrain from engaging in strike activity. Section 7 of the NLRA expressly provides that:

> [e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all such activities*. . . .

29 U.S.C. § 157 (emphasis added). Thus, when certain striking employees applied for reinstatement prior to the end of the strike (and thereby exercised their statutory right to refrain from strike activity), the Company was under a statutory duty to reinstate them to their same or substantially equivalent jobs, if available. Since jobs were available, the Company reinstated these employees at the time they applied for reinstatement in accordance with their statutory rights.

Under the NLRA, striking employees simply do not lose or forfeit their status as "employees" entitled to the protections of the NLRA. 29 U.S.C. § 152(3). Retention of employee status under the NLRA, however, does not guarantee a striking employee the right to job reinstatement. During an "economic

strike" (a strike over wages, hours or terms and conditions of employment), an employer is free to hire permanent replacements and is under no obligation to displace such replacements when striking employees subsequently apply for reinstatement.[9] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). In *Mackay Radio*, this Court established an employer's right to replace economic strikers:

> Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although section 13 of the act, 29 U.S.C.A. § 163, provides, "Nothing in this Act [chapter] shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. *The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.*

304 U.S. at 345-46 (footnote omitted; emphasis added).

In the instant case, therefore, had the Company hired permanent replacements during the strike to fill all available positions, the striking employees would have had no right to displace anyone when they applied for reinstatement after the strike. The negotiated PRS simply provided strikers who returned to work prior to the end of the strike with the same protection from displacement at the end of the strike as would

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[9] Neither the NLRB nor the D.C. Circuit ever held that the strike at Banta was anything but an economic strike. In fact, the Administrative Law Judge to whom the matter was initially tried expressly found that the strike was an economic strike (Appendix B, 52).

be granted to persons hired during the strike as permanent replacements.[10]

The D.C. Circuit's decision is the first holding by a federal appellate court that the job rights of a former striker, reinstated during the course of a strike according to his or her statutory right to refrain from strike activity, are *inferior* to the job rights of a permanent replacement for a striker. The D.C. Circuit's decision requires the displacement of a reinstated striker if a more senior striker subsequently applies for reinstatement. Indeed, a fair reading of the decision would require the displacement of an employee who never struck by a more senior striker in the event that there were not enough jobs available for the entire pre-strike complement of employees following the strike. This holding not only is inherently destructive of an employee's right not to engage in a strike, a right co-equal with the right to strike, but also is in conflict with the basic rationale of *Mackay Radio.*

The D.C. Circuit's decision sets forth as a principle of law that economic strikers who desire to return to work prior to the end of a strike must, in effect, abandon their statutory right to reinstatement with seniority intact if they want to avoid being subsequently displaced by more senior strikers. To avoid the risk of such displacement, former strikers would have to quit their jobs and then be hired as "permanent replacements," *i.e.,*

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[10] Contrary to the D.C. Circuit's suggestions, former strikers who were reinstated prior to the end of the strike received no special benefits. None of the former strikers, for example, were granted any super-seniority. To the contrary, all of the former strikers who returned prior to the end of the strike came back under the terms of the old contract. And, once the new collective bargaining agreement was agreed upon, the Company applied the new contract to all employees equally, regardless of whether they returned to work prior to the end of the strike or waited until the end of the strike to make an unconditional offer to return to work. ***The only benefit granted to former strikers by the negotiated PRS was the right not to be subsequently displaced, i.e., the same right that permanent replacements would have.***

as new hires by the employer. It is totally incongruous to hold, as the D.C. Circuit's opinion does, that a union may not insist on the displacement of a person hired as a replacement for a striker, but must insist on the displacement of an employee who returned to work prior to the end of a strike.[11]

The holding of the D.C. Circuit is in clear conflict with the rationale of the Seventh Circuit's very recent holding in *Giddings & Lewis, Inc. v. NLRB*, 675 F.2d 926 (7th Cir. 1982). In *Giddings & Lewis*, at the end of the strike, the Giddings & Lewis work force consisted of persons hired as permanent replacements during the strike and twenty-two former strikers who had applied for reinstatement and had been reinstated prior to the end of the strike. *Id.* at 927 n.l. Giddings & Lewis subsequently unilaterally adopted a policy which provided that "permanent replacements *and reinstated strikers* would not lose their positions to more senior unreinstated strikers should a layoff occur." *Id.* (emphasis added).

The Giddings & Lewis layoff policy, thus, protected permanent replacements *and less senior strikers already reinstated to jobs* from job displacement by more senior unreinstated strikers. It is clear, therefore, that at the end of the Giddings & Lewis strike, senior strikers were not permitted to bump less senior strikers from jobs to which they had already been reinstated. By upholding Giddings & Lewis' actions, the Seventh Circuit merely recognized that a striker who returns to work during the course of a strike should at least have the same protection against job displacement as is granted a permanent

[11] Nothing in the settlement stipulation is contrary to the analysis discussed herein. Indeed, the settlement stipulation only required the Company to reinstate strikers to *available* jobs. (C. P. Ex. 3). If the Company was not legally obligated to displace strikers reinstated during the course of the strike, positions filled by strikers who returned to work during the course of the strike would not be "available" jobs.

replacement. The D.C. Circuit's decision in the instant case is in irreconcilable conflict with the *Giddings & Lewis* opinion.

The rationale of the *Giddings & Lewis* decision expressly protects the job rights of both permanent replacements *and* striking employees who apply for reinstatement and are reinstated prior to the strike's end. The *Giddings & Lewis* decision avoids the anomaly of the D.C. Circuit decision in the instant case which inexplicably grants permanent replacements greater job rights than employees who return to work during the course of a strike.

By granting employees who choose to refrain from strike activity inferior job rights to those granted permanent replacements, the D.C. Circuit's decision will affect every employer and every employee involved in a strike. The significance of the decision is apparent when the number of strikes and striking employees is considered. From 1970 to 1979, a representative period, there were an average of 5353 strikes per year in the United States, involving an average of 2,288,400 workers yearly. *See* Monthly Labor Review (U.S. Department of Labor, Bureau of Labor Statistics), Volume 104, Number 12 (December, 1981). The petition should be granted to resolve the important questions of federal law raised by the D.C. Circuit's decision which effectively limits the statutory right of employees to refrain from engaging in strike activity, in direct contravention of federal labor policy.

**III. The Decision Of The D.C. Circuit In Finding That The Negotiated Reinstatement System Did Not Constitute A Clear And Unmistakable Waiver Of Statutory Rights Conflicts With Supreme Court And Other Appellate Court Decisions Honoring Such Contractual Waivers And Directly Undercuts National Labor Policy Fostering Freedom Of Contract.**

This litigation arose primarily because the Company reinstated striking employees to available jobs at the end of the

strike in accordance with the negotiated Preferential Reinstatement System (PRS), which was signed by the Company and the Union as an integral part of the negotiated collective bargaining agreement. The negotiated PRS explicitly set forth the method by which striking employees would be recalled to work and provided that former strikers who returned to work prior to the end of the strike would not be subject to displacement by other strikers who subsequently applied for reinstatement at the end of the strike (Appendix E ). Although the Company reinstated strikers in accordance with the negotiated terms of the PRS, the Union filed unfair labor practice charges alleging that the PRS unlawfully discriminated in favor of employees who had returned to work prior to the end of the strike. In rejecting the Company's position that the Union had waived whatever statutory reinstatement rights the strikers may have had when it signed the PRS as part of the collective bargaining agreement, the District of Columbia Circuit held that a clear and unmistakable waiver of statutory rights did not occur (Appendix A, 18-19). In so ruling, the decision conflicts not only with the import of prior Supreme Court decisions, but with other federal appellate court decisions, including a recent decision by another panel of the D.C. Circuit. Moreover, the D.C. Circuit's decision, in summarily refusing to give effect to a clear and unambiguous contractual provision negotiated in good faith by both the Company and the Union, runs directly counter to the fundamental national labor policy fostering freedom of contract. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

The negotiated PRS is "an express statement in the contract" with respect to the reinstatement rights of the striking employees. *Drake Bakeries, Inc. v. Local 50*, 370 U.S. 254, 265 (1962). Consistent with the Supreme Court's decision in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278-80 (1956), and *Drake Bakeries, supra*, such a contractual provision constitutes a valid waiver of whatever statutory reinstatement

rights the striking employees may have been entitled to at the end of the strike. In sharp contrast with the D.C. Circuit's opinion in the instant case, numerous other federal appellate courts, including the D.C. Circuit, have cited *Mastro Plastics* in finding contractual waivers of statutory rights. *See, e.g., Fournelle v. NLRB*, 670 F.2d 331, 336 (D.C. Cir. 1982) ("The policies compelling the Board and courts to honor such contractual waivers are fundamental ones under the NLRA"); *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 476 (5th Cir. 1982); *Pacemaker Yacht Company v. NLRB*, 663 F.2d 455 (3d Cir. 1981); *Prudential Life Insurance Co. v. NLRB*, 661 F.2d 398 (5th Cir. 1981). *See also NLRB v. Lundy Manufacturing Corp.*, 316 F.2d 921, 925 (2d Cir.), *cert. denied*, 375 U.S. 895 (1963) ("... the rights recognized in § 7 may be affected by a valid collective bargaining agreement; to deny this would be to ignore not only the exclusive-representation principle of § 9(a) but the whole policy of Congress, set forth in § 1, of 'encouraging the practice and procedure of collective bargaining' and relying on such agreements for the maintenance of industrial peace...").[12]

The decision of the court below, however, held that the negotiated PRS signed by both the Company and the Union did not constitute a "clear and unmistakable" waiver of the strikers' statutory reinstatement rights (Appendix A, 18-19). The court reached this conclusion solely on the basis of its review of certain correspondence between the Company and the Union prior to the parties signing the collective bargaining agreement which included the PRS. The exchanges established that while the Union reserved the right to challenge the legality

[12] The Board itself has held that the reinstatement rights of striking employees may be waived by clear and unmistakable provisions in a collective bargaining agreement. *See, e.g., United Aircraft Corp.*, 192 N.L.R.B. 382 (1971), *modified*, 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *Western Steel Casting Co.*, 233 N.L.R.B. 870 (1977).

of the negotiated PRS, a right which the Company recognized, the Company specifically advised the Union that it did not construe the Union's acceptance of the PRS as a waiver of reinstatement rights under the NLRA "except to the extent that such rights are waivable and have been waived by the language of the agreement" (Appendix E, 9). By relying entirely on the exchange of correspondence in holding that there was not a "clear and unmistakable" waiver of statutory rights, the court below seriously misinterpreted the Supreme Court's statement in *Drake Bakeries* that statutory rights are waived by "an express statement in the contract." *Drake Bakeries, Inc. v. Local 50, supra,* at 265. It is the explicit language of the collective bargaining agreement, *not* the correspondence relied on by the D.C. Circuit, that creates the waiver.[13] If the parties' correspondence prior to signing the collective bargaining agreement is probative of anything, it highlights the Company's efforts to inform the Union that by signing the contract which included the PRS, the Union waived any rights that the striking employees may have had under the NLRA "to the extent that such rights are waivable and have been waived *by the language of the agreement*" (Appendix E, 9).

[13] The court's misplaced analogy to the "battle of the forms" in a commercial law context (Appendix A, 4-5) illustrates that the court focused on the wrong documents. In commercial law, the "forms" (*e.g.*, forms of offer and acceptance) establish the existence or non-existence of a commercial contract. *See* UCC § 2-207. If the forms indicate that a "meeting of the minds" never occurred, a contract will not exist. Such an analogy is totally inappropriate to the instant situation where the contract (the collective bargaining agreement including the PRS which was an integral part thereof), clearly existed and set forth the reinstatement rights of strikers in clear and unambiguous terms. Where the terms of a commerical contract are embodied in a writing, the "parol evidence" rule precludes reliance on prior agreements or collateral documents to vary or contradict the express terms of the agreement. Given the existence of an unambiguous contract provision setting forth striker reinstatement rights, the court's reliance on "parol evidence" to nullify the contract provision is clearly improper.

In looking to parol evidence rather than the contract itself to decide whether there was a waiver, the decision of the court below directly conflicts with the recent decision of the Fifth Circuit in *Prudential Life Insurance Co. v. NLRB*, 661 F.2d 398 (5th Cir. 1981). In holding that a contractual provision constituted a waiver of an employee's statutory right to have union representation at an investigatory interview, the Fifth Circuit noted that "[a]lthough the Union indicated that Prudential's position was contrary to law, Prudential made it clear that it considered the [contract] clause a waiver of the [statutory] right." *Id.* at 401. Similarly, in the instant case, although the Union likewise disputed the legality of the PRS, the Company made it clear that it considered the PRS to be a waiver of the strikers' reinstatement rights to the extent that such rights were legally waived by the language of the agreement.

The petition should be granted in order to resolve an important question of federal labor law concerning what constitutes a contractual waiver of statutory rights.[14] Moreover, the petition should be granted since the Supreme Court has presently pending a case raising a very similar legal issue, *i.e.*, what constitutes a contractual waiver of a statutory right under the NLRA. *Metropolitan Edison Co. v. NLRB, cert. granted,* ___ U.S. ___, 102 S. Ct. 2926 (1982).

[14] Whether there is a contractual waiver is not affected by the settlement stipulation. In the first place, the existence of such a settlement stipulation does not preclude a union from waiving statutory rights. *Southwestern Bell Telephone Co. v. NLRB*, 667 F.2d 470, 476 (5th Cir. 1982). In any event, the settlement stipulation required the Company to bargain in good faith and to reduce any agreement to writing. In accordance with the settlement stipulation, the Company bargained in good faith with the Union and reduced the resulting labor agreement, including the negotiated PRS, to writing. Thus, the legal question is the same under either the NLRA or the settlement stipulation, *i.e.*, has there been a valid contractual waiver of the strikers' reinstatement rights.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

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